FRONT LINE Report

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UPI photo/William Greenblatt

Attending a security meeting are from left above, Missouri National Guard Lt. Col. Robert Petrich, Attorney General Jay Nixon and state security adviser Tim Daniel.

## Nixon assessing state security

**ATTORNEY GENERAL** Jay Nixon is overseeing the government operations and facilities committee of the Missouri Security Panel. The panel was formed to assess the security of the state in the wake of the Sept. 11 terrorist attacks and make recommendations for improvements.

Committee members include Brookfield Police Chief David Hane, Camden County Sheriff John Page, Springfield Police Chief Lynn Rowe, Highway Patrol Superintendent Col. Roger Stottlemyre and St. Joseph emergency management coordinator Ed Wildberger.

## 'Innocent behavior' can create reasonable suspicion

**IN AN IMPORTANT** decision affecting the ability of officers to make *Terry* stops based on reasonable suspicion, the U.S. Supreme Court confirmed that even innocent-appearing behaviors can justify an officer's suspicion of criminal activity.

In January, the court unanimously ruled in *U.S. v. Arvizu* that a trained officer "need not rule out the possibility of innocent conduct" in determining whether reasonable suspicion exists.

A federal border patrol agent stopped Ralph Arvizu's minivan on an isolated dirt road near the Mexican border and found more than 100 pounds of marijuana. Arvizu argued that the officer lacked reasonable suspicion to make the stop.

Besides the fact that the area was known for drug smuggling, the officer noticed that Arvizu had a very stiff posture as he drove by, did not make eye contact, slowed from 50 mph to 30, and acted as though he did not see the officer. Also, as the officer began to follow, all three

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# Refusal to take sobriety test can't be withdrawn

**THE WESTERN DISTRICT** Court of Appeals in January held that once a DWI defendant has refused to take a sobriety test under Missouri's implied consent law, then "none shall be given."

Under *Phillips v. Wilson*, the court said a suspect has only one chance to decide whether to get tested, and once a suspect has said "no," an officer should not try to change that decision.

After his arrest, Stephen K. Phillips was informed of his statutory rights through the implied consent warning. He refused to take the test but later changed his mind. Phillips failed all three field sobriety tests given by a Lake Winnebago police officer.

During a hearing in which the revenue director sought to suspend his license for one year for refusing to take the test, Phillips argued that since he subsequently offered to take the test, no refusal had occurred.

The court disagreed: "The fact that a driver may change his mind after an initial refusal and consent to the test is of no consequence." Section 577.041.1 states that if an arrested DWI suspect refuses to submit to a test, no test will be given.

# Avoiding drug checkpoint can create reasonable suspicion to stop

**IN A SPLIT DECISION,** the Missouri Supreme Court has ruled in *State v. Mack* that an attempt to avoid a drug checkpoint by a suspect, along with other suspicious behavior, creates reasonable suspicion that permits officers to stop and investigate.

This decision, however, does not affect last year's *Indianapolis v. Edmond* decision, where the U.S. Supreme Court ruled that drug checkpoints are unconstitutional.

The *Edmond* ruling had overturned another Missouri Supreme Court decision, *State v. Damask*, that allowed such checkpoints.

Relying on *Damask*, many departments in Missouri were conducting drug checkpoints. Police would place a sign saying "Drug Checkpoint Ahead" on the highway, but then would put the checkpoint on the next exit ramp — which inevitably was isolated with no amenities or homes.

The Troy Police Department conducted such a checkpoint in 1999. When Todd Mack saw a sign on divided Highway 61 in Lincoln County, he veered onto an isolated exit ramp. Police charged Mack with various drug offenses after a consensual search revealed several drugs in his vehicle.

Then the *Edmond* decision came down. The Mack stop could not be justified as a suspicionless, random roadblock stop because the ruling made such drug stops impermissible.

The state instead successfully argued to the Missouri Supreme Court that Mack's efforts to avoid a perceived checkpoint "ahead" by veering onto an isolated exit ramp created reasonable suspicion to make a *Terry* stop to investigate.

**Drug checkpoints still illegal**
Drug checkpoints — where the sole purpose is to detect drug couriers — still are illegal. The *State v. Mack* decision does not alter this fact. Other checkpoints continue to be legal and permissible if conducted properly.

The state Supreme Court ruled this behavior did create reasonable suspicion and the officers were justified in stopping the vehicle. Three judges dissented and argued that this type of behavior — which is not illegal per se — cannot create reasonable suspicion.

Two points must be emphasized:

- The *Mack* decision **does not** overturn *Indianapolis v. Edmond*, and suspicionless stops at drug checkpoints are illegal.
- Reasonable suspicion does not arise automatically when a driver exits onto a ramp after seeing a "Drug Checkpoint Ahead" sign, although this fact can be considered suspicious. In *Mack*, police observed the unusual and suspicious manner in which the driver exited. Without that evidence, the outcome may have been different.

# Licensing checkpoints still valid

**A RECENT FEDERAL** appeals court decision gives law enforcement more guidance on using roadblocks.

In *United States v. Davis*, the Federal Court of Appeals for the District of Columbia upheld the use of roadblocks to check registration, although a secondary purpose was for drug detection.

This opinion is important for two reasons:

- It reaffirms the right of police agencies to conduct checkpoints for licensing and registration following the U.S. Supreme Court decision in *Indianapolis v. Edmond*, which found that a roadblock cannot be used if the primary purpose is to detect drugs.
- It clearly establishes that agencies can take steps to detect drug trafficking during a valid checkpoint if drug detection is not the primary purpose.

Agencies, however, cannot simply "rename" their drug checkpoints to make them legal.

The U.S. Supreme Court clearly has indicated that a checkpoint whose primary purpose is to detect drugs is unconstitutional, and calling it a "licensing checkpoint" makes the seizure no more proper.

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# UPDATE: CASE LAW

## MISSOURI SUPREME COURT

### DRIVING WHILE REVOKED

**State v. John Rowe**
No. 83880
Mo.banc, Jan. 8, 2002

The court reversed the defendant's felony conviction of driving while revoked (Section 302.321, RSMo.).

Rowe, an Iowa resident, had his drivers license canceled in Iowa. Under the plain meaning of the statute, the defendant's license was not canceled, suspended or revoked under the laws of this state. Rowe conceded he had no privilege to drive on Missouri roads and violated Section 302.202, a misdemeanor offense of driving without a valid license.

## WESTERN DISTRICT

### ATTEMPT CRIMES — SUBSTANTIAL STEP

**State v. Jerome Bates**
No. 59307
Mo.App., W.D., Jan. 22, 2002

There was insufficient evidence of Bates' conviction of attempted statutory rape and sodomy (both second degree). The defendant, a Missouri inmate, sent correspondence to the victim, a young girl, that expressed the desire to become sexually active with her.

The actions did not legally constitute a substantial step toward commission of statutory rape and sodomy because the defendant took no action beyond expressing desire. The court analogized to *State v. Molasky*, 765 S.W.2d 597 (Mo.banc 1989), holding that substantial step is evidenced by actions, indicative of purpose, not mere conversation alone.

### DRUG-FREE ZONE

**State v. Jared R. Derenzy**
No. 58982
Mo.App., W.D., Dec. 11, 2001

There was sufficient evidence the defendant knew his residence was within 2,000 feet of the college he attended when he delivered drugs in violation of Section 195.214.

While the defendant argued evidence did not prove the distance between his house and college was less than 2,000 feet, circumstantial evidence proved reasonable inferences of the knowledge element.

### CRIMINAL NONSUPPORT

**State v. Charlene Ann Sellers**
No. 59263
Mo.App., W.D., Jan. 15, 2002

There was sufficient evidence of the defendant's conviction for criminal nonsupport.

From 1994 to 1998, Sellers did not pay child support through the court system, with a total arrearage of $7,520.95. She never provided financial support directly to her ex-husband for her three children and only sporadically provided clothes, groceries, school supplies and medical attention. The court did err in convicting Sellers of Class D felony nonsupport because there was insufficient evidence to show total arrearage for one child exceeded $5,000.

## SOUTHERN DISTRICT

### DISCOVERY

**State v. Orlandis Farr**
No. 23898
Mo.App., S.D., Dec. 31, 2001

The state violated discovery rule 25.03(A)(2) when it failed to disclose the defendant's job application, which constituted a statement under the rule. The statement should have been disclosed even though it was used to impeach the defendant during cross-examination. The violation, however, did not constitute prejudicial error by affecting the outcome of the case.

### PROBATION REVOCATION

**Bruce D. Roach v. State**
No. 24181
Mo.App., S.D., Jan. 18, 2002

Under the versions of sections 559.016 and 559.035 in effect when Roach was sentenced, the trial court was prohibited from granting a second period of probation following a revocation that would extend beyond the five-year maximum set forth in Section 559.016.

Because a term of probation cannot be extended beyond five years for a felony and because the version of Section 559.036.3 in effect when Roach was sentenced did not permit a second term of probation to be imposed ("notwithstanding any amount of time served ... on the first term of probation"), the court's jurisdiction over appellant ceased before the court tried to revoke probation.

Section 559.036.3 now allows the court to revoke probation and order any existing sentence to be executed if a defendant violates probation, or, if imposition of sentence was suspended, to "impose any sentence available under section 557.011, RSMo."

## DWI, vehicular homicide seminar in May

Staff from the Attorney General's Office will be serving as instructors at a DWI/vehicular homicide seminar on May 2-3 at the Lodge of the Four Seasons at the Lake of Ozarks.

Nationally recognized experts will present a program on how to investigate and prosecute these cases.

If you are interested in attending, call Bev Case at the Missouri Office of Prosecution Services at 573-751-0619.

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## ARVIZU: CONTINUED FROM PAGE 1

children in the van began to wave in a "mechanical" manner, as if instructed to do so.

The officer said all of these factors made him suspicious of smuggling activity and so he stopped the vehicle to investigate. He testified that when he met people on the isolated road, they usually waved and acknowledged his presence and seldom slowed.

A lower appellate court ruled the stop was improper because "each observation by [the officer] that was readily susceptible to an innocent explanation was entitled to 'no weight.'"

However, the Supreme Court said this was not the proper way to analyze the legality of a *Terry* stop. The courts are to look at "the totality of the circumstances"— including facts that may have an innocent explanation.

Thus, while not acknowledging the officer, slowing down, or waving mechanically each might have a logical, legal and innocent explanation, an officer can consider whether the totality of those facts would make a reasonable officer suspect possible criminal activity.

The Supreme Court said an officer is "entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area's inhabitants." It also noted that "some factors are more probative than others." For example, the failure to make eye contact is not a strong indication of criminal activity, but it can be a factor a trained officer may consider, along with others, in assessing a situation.

This case does not remove the prohibition against making a *Terry* stop based on a "hunch" or mere suspicion. The suspicion must be an objectively reasonable one based on facts that lead a reasonable officer to believe criminal activity may be occurring.

## Tinted windows law in effect

The governor on Feb. 14 signed into law bills that revise the tinted windows legislation passed last year. The law took effect the same day.

The legislation addresses concerns raised after the 2001 session, including the lack of a grandfather provision for drivers who already had tinted windows.

SB 727 and HB 1386 &1038 make these changes:

- Permits a vehicle to have a sun screening device on front side-wing vents or driver and passenger windows that have a light transmission of at least 35 percent plus or minus 3 percent.
- Allows the Public Safety Department to issue a permit to a driver with a doctor's prescription to operate a vehicle with darker tints, and allows the department to make rules regarding these permits. Historical vehicles also may have darker tints.
- Removes the requirement that a vehicle comply with the tinting law to pass inspection.

The law continues to exempt factory-installed tinting from the light transmission restrictions.

## Removal of statute of limitations for rape prosecutions considered

The House and Senate are considering legislation to remove the three-year statute of limitations for prosecuting rape cases. Both bills continue to be amended so check the Internet at www.senate.state.mo.us or www.house.state.mo.us for the latest versions of SB 650 and HB 1037.